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No. 75-777

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent suggests (Br. in Opp. 2-5) that because the court of appeals remanded this case to the Board, its judgment is "non-final" and not appropriate for review by this Court. However, respondent then proceeds to argue (Br. in Opp. 4) that the remand would serve no useful purpose, and that the issue presented by the petition is, indeed, ripe for adjudication by this Court at this time.

The court of appeals indicated (see Pet. 7, n. 2) that, on remand, the Board would be free to consider (1) whether

the work preservation clause in Hudik's contract was intended to cover the work here at issue; (2) whether Hudik knowingly entered into the subcontract in contravention of its preexisting bargaining agreement; and (3) whether the Union was in fact trying to organize Slant/Fin's employees. However, as respondent points out (Br. in Opp. 3), the language of the work preservation clause is broad enough to cover the work in dispute, all parties before the Board so assumed, and the Board so assumed in arriving at its decision.[1] As to the remainder of the remanded issues, the Administrative Law Judge, in findings that the Board did not disturb, concluded that Hudik was aware of the Austin specifications prior to making its bid and at the time it executed the subcontract (Pet. App. 148a, and n. 3), and that there is no evidence that the Union was trying to organize Slant/Fin's employees (Pet. App. 152a). A remand therefore would serve no useful purpose.[2]

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[1]The Administrative Law Judge expressed the opinion (Pet. App. 155a) that "the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job." However, his ensuing analysis (Pet. App. 155a-164a) shows that this view was "not a major basis of [his] decision" (Pet. App. 155a). Moreover, the Board's decision (Pet. App. 140a-142a) reflects an assumption that the work preservation clause covered the disputed work.

[2]Moreover, the remand was necessitated only by the court of appeals decision upon the legal issue presented in the petition. If the court of appeals' judgment is reversed, this case will come to an end immediately. We submit that the judgment possesses sufficient finality that review is both appropriate and necessary. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3.

For these reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JANUARY 1976.